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Nos. 95-124; 95-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, *et al.*,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ALLIANCE FOR COMMUNITY MEDIA, *et al.*,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT

The Association of American Publishers, Inc. (AAP) submits this brief *amicus curiae*, pursuant to Rule 37 of the Rules of this Court, urging reversal of the decision below. This brief is submitted upon the written consents of counsel to both petitioners and respondents, which are submitted herewith.

THE AMICUS

AAP is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately 200 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books produced in the United States.

As technology evolves, and the means by which the American public receives information proliferate, AAP's members are themselves experiencing profound change. To be sure, the publication of hardcover and softcover books, and their distribution to the nation's bookstores, continues. But the computer age and, more recently, the advent of the Internet are creating a new "electronic" marketplace in which both product and mode of delivery are assuming different forms. Increasingly competing for the consumer dollar with traditional paper versions of all manner of literature are works of similar content on-line, on CD-ROM, and on audio tape. More and more American consumers are supplementing their bedside paperback books with reference and other works read *and* viewed on computer monitors. And, while once Americans read, listened to music, and watched movies via discrete media, the emerging multimedia environment now combines these media into a single product capable of being delivered to consumers in CD-ROM format through commercial outlets

and on-line directly to their homes, via telephone lines linked to personal computers and coaxial cables connected to television sets. These transformations are occurring at a breathtaking pace, and AAP's members are eager participants in this exciting new marketplace.

INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT

This case is about government suppression of constitutionally protected speech on one node of the developing new media—cable television. Under the guise of protecting minors (persons under 18 years of age) from the allegedly harmful effects of "indecent" speech, Congress and the Federal Communications Commission (FCC) have established a regulatory regime which has as its avowed purpose, and will have as its indubitable effect, the "sanitizing" of certain cable channels which, ironically, were established by earlier government mandate to provide the public with maximally diverse program fare. The statutory and regulatory scheme here under examination would purge leased access cable channels of any content which, in the "reasonabl[e] belie[f]" of a cable system operator, contains "patently offensive" descriptions or depictions of sexual activities, as measured by "contemporary community standards," and would have the same impact on public-educational-government (PEG) access channels.

This is not the first effort on the part of Congress, the FCC, or the states to regulate "offensive" speech. Since this Court's emphatically narrow holding in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 750 (1978), this country has seen a rapidly expanding regime of indecency regulations affecting many forms of media—a state of affairs never contemplated in 1978 when *Pacifica* was decided. This second tier of speech regulations, separate and apart from obscenity regulations, has developed largely unexamined by this Court.

It is particularly alarming to AAP's members that the Federal government would attempt to impose on one of the most important and promising of the new media—namely, cable television—a set of speech restrictions which greatly exceed in scope the extremely limited regulation of sex-related speech previously condoned by this Court. As noted, the manner of delivery of information to the American public is evolving at a rapid pace. The one-time universe comprising the arguably discrete worlds of "print" and "broadcast" is no longer. The worlds of print, broadcast, cable and, most recently, on-line and CD-ROM delivery are increasingly converging. AAP's book publisher members are committed to adapting to provide the same rich diversity of works to the consuming public by whatever avenues technology, and the demands of consumers, dictate. But regulatory approaches such as that here under examination, which treat new media more as speech threats than as speech opportunities, jeopardize the fulfillment of these First Amendment objectives.

The indecency standard at issue here is utterly vague. By purporting to cover anything depicting or describing sex or sexual organs which is "patently offensive" according to "contemporary community standards," it contains absolutely no terms susceptible of objective measurement. In practice, the provisions would substitute judgments as to majoritarian taste and personal morality for the constitutionally mandated tenets of pluralism and tolerance in matters relating to speech—the recognition that "one man's vulgarity is another's lyric." *Cohen* v. *California*, 403 U.S. 15, 25 (1971). The regulatory scheme is all the more objectionable given the fleeting nature of what, at any given time, in any given "community," may constitute "acceptable" program fare.

By forcing programmers and cable operators to guess at what constitutes "patently offensive" sexual material, the indecency provisions will, if upheld, undoubtedly achieve their invidious and unconstitutional goal of substantially rid-

ding most cable access channels of all non-obscene programming that conceivably might be thought to offend majoritarian sensibilities. Cable access programming will be reduced to a bland "lowest common denominator," thereby contravening not only the very purpose for which Congress mandated the existence of such channels in the first place, but also the First Amendment rights of cable programmers, cable operators, and viewers.

What cable programmer, for example, offering a feature on the current exhibition "Feminine/Masculine: The Sex of Art" at the Georges Pompidou Center in Paris—a major exhibition widely covered in the U.S. press which features Gustave Courbet's famous close-up of female genitals (*The Origin of the World*) and sexually-explicit works by virtually every major 20th-century artist—will be able to determine and certify with a reasonable level of certainty that the program is not "indecent"? Will a public forum program be able to feature a discussion of sex educational or AIDS prevention materials without fear of sanction? Will the soon-to-be launched BookNet cable programming service risk a reading of a chapter from Philip Roth's *Sabbath's Theater* (1995) (winner of the National Book Award), Vladimir Nabokov's *Lolita* (1955), or Marguerite Duras's *The Lover* (1984) (winner of France's esteemed Prix Goncourt)? Can it possibly be that such readings on the steps of the New York Public Library would be perfectly lawful but subject to censorship and sanction if rendered on a cable channel?

The import of permitting such vague speech restrictions to stand cannot be underestimated. Congress appears poised to enact, as part of its sweeping telecommunications reform legislation, provisions which would impose severe criminal penalties for the distribution of "indecent" material (defined in a virtually identical fashion as in the cable legislation at issue here) over any telecommunications device, *i.e.*, via any form of computer and embracing all manner of transmissions over the Internet. The resolution of this case and, in particular, the

extent to which this Court will allow constitutionally protected speech to be restricted based only on a majoritarian notion of "offensiveness," stands to have a direct effect not only on speech occurring through the medium of cable television, but on all manner of speech in the new media marketplace.

The unconstitutionality of the challenged provisions is manifest. This Court has prescribed the circumstances in which sexually-frank expression is subject to government regulation. *Miller* v. *California*, 413 U.S. 15 (1973), and its progeny set forth a tripartite test which features speech-sensitive protections utterly absent from the indecency standard challenged here. Perhaps most critically, the *Miller* obscenity test requires a showing that the work at issue, taken as a whole, lacks serious literary, artistic, political or scientific value. As Judge Wald aptly points out in her dissenting opinion below, the instant legislation has the perverse effect of targeting for censorship works whose "very merit will be inseparable from [their] 'offensiveness'." *Alliance for Community Media* v. *FCC*, 56 F.3d 105, 130 (D.C. Cir. 1995) (Wald, J., dissenting).

Nor can solicitude for minors' sensibilities justify so vague and overbroad a regulatory scheme. As this Court has observed, it is no answer to a hopelessly vague regulation "to say that it was adopted for the salutary purpose of protecting children." *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 689 (1968). Equally, where, as here, the effect of a regulatory scheme is to reduce the adult population's access to speech to solely that which is acceptable for children, its unconstitutional result is "to burn the house to roast the pig." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

The indecency regulations fail to survive constitutional scrutiny for reasons in addition to their vagueness. The challenged provisions are classic content-based regulations which presumptively violate the First Amendment. Along the lines recently suggested by Justice Kennedy in *Simon & Schuster*

v. *Members of the N.Y. Crime Victims Bd.*, 502 U.S. 105, 124-128 (1991) (Kennedy, J., concurring), AAP and its members would prefer that the Court conclude that such content-based restrictions on speech, falling outside of a few well-recognized exceptions, be held unconstitutional without need for further analysis. Should the Court instead continue to employ its strict scrutiny analysis, it should nevertheless find for the petitioners, since the government has failed to marshall evidence to establish that the challenged regulation is the least restrictive means of advancing a compelling state interest. By accepting the government's asserted interest at face value and by essentially defining the least restrictive means of achieving the government's goal as the *most effective* means, the court below robbed the strict scrutiny test of its power to protect free speech.

In this connection, AAP urges the Court to recognize that the technology that is fueling the development of the new media is also providing new means for protecting children from exposure to unsuitable material. Consortia of technology companies and content providers to the new media are devoting significant resources to this task. Rather than resort to the blunt and constitutionally flawed instrument of "indecency" regulation in an effort to balance speech interests with solicitude for minors, AAP urges that we allow the marketplace, committed parents, and the wondrous potential of new technology to arrive at solutions more consonant with our First Amendment traditions.

ARGUMENT[1]

I. THE ACT'S INDECENCY STANDARD IS UNCONSTITUTIONALLY VAGUE AND, AS A RESULT, THREATENS TO CHILL PROTECTED SPEECH

The definition of "indecent" in Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. §§ 531, 532(h), and 532(j)) (the "Act"), and the regulations promulgated thereunder, is unconstitutionally vague. Section 10(a) of the Act, as implemented by the FCC, permits a cable operator to refuse to carry on leased access channels "indecent programming," which is defined as programming that the operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pub. L. No. 102-385, § 10(a), 106 Stat. 1486 (to be codified at 47 U.S.C. § 532(h); FCC regulations codified at 47 C.F.R. § 76.701(a) (1995)). Section 10(b) directs the Commission to adopt rules, which it has done, requiring cable operators which have not banned "indecent" programming—defined by the FCC as in section 10(a) but with the addition of the phrase "for the cable medium" at the end (47 C.F.R. § 76.701(g) (1995))—to segregate such programming, as identified by program providers, on a separate channel and block that channel unless the subscriber requests access in writing. Pub. L. No. 102-385, § 10(b), 106 Stat. 1486 (to be codified at 47 U.S.C. § 532(j)). The FCC regulations also require leased access programmers to identify whether any of their programming is indecent and to certify, at the operator's request, whether any or all of their programming is indecent or obscene. 47 C.F.R. § 76.701(d)

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[1] AAP joins as well in the concerns addressed in the brief, *amici curiae*, submitted by American Booksellers Foundation for Free Expression, *et al.*

and (e) (1995). Furthermore, the FCC has interpreted section 10(c) to authorize cable operators to ban indecent material, as similarly defined, from PEG access channels (channels reserved for public, educational, or governmental use). 47 C.F.R. § 76.702 (1995). The definition of "indecent," therefore, pervades section 10 and the implementing regulations.

The Act's definition of "indecent" does not meet the governing constitutional standards. In particular, it is unconstitutionally vague. The due process doctrine of vagueness incorporates two basic principles. First, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *Smith* v. *Goguen*, 415 U.S. 566, 572 (1974); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961).[2] Second, a statute must provide explicit standards for those charged with its enforcement so as to prevent discriminatory application. *Grayned*, 408 U.S. at 108-09.

This Court repeatedly has emphasized that the vagueness doctrine applies with particular force in relation to regulations of constitutionally protected speech. As the Court stated in *Smith* v. *Goguen*, where a statute "is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." 415 U.S. at 573.[3] Thus, where First Amendment

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[2] *See also Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

[3] *See also Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603-04 (1967) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (*quoting NAACP*

interests are at stake, the Court has emphasized that "precision of drafting and clarity of purpose are essential." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217-18 (1975). Such exactitude is necessary since "[u]ncertain meanings" inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (*quoting Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)). Vague regulations inhibit freedom of speech by forcing people to conform their speech to "that which is unquestionably safe." *Baggett*, 377 U.S at 372.

Examination of the language of the Act alone quickly reveals that its definition of indecency stunningly fails both objectives of the vagueness doctrine. The definition of indecency does not give cable programmers a reasonable opportunity to discern on which side of the line their programming falls, and, given its lack of precision, it necessarily invites discriminatory application by cable operators. The term is utterly and hopelessly vague by any measure, much less by the heightened standard applicable to regulations of speech. It is an entirely subjective term, containing no normative guideposts at all. *See Cramp*, 368 U.S. at 279, 286 (oath requiring Florida state employees to swear that they have never lent "aid, support, advice, or counsel or influence to the Communist Party" is "completely lacking in . . . terms susceptible of objective measurement").

Although "we can never expect mathematical certainty from our language" (*Grayned*, 408 U.S. at 110), "offensiveness" is merely a matter of personal taste, and the addition of the adjective "patently"—a word meaning little more than "very"—fails to add any meaningful definition. Nor does

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v. *Button*, 371 U.S. 415, 432-33 (1963)); *Smith* v. *California*, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.").

"contemporary community standards" provide any solid grounding. In this pluralistic society, with its many communities of widely varying social and political views—even within a given geographic area—there is no widespread consensus on what is offensive.

Moreover, in contemporary America, a great deal of sex-related speech which may long ago have been considered too risqué for popular consumption has since been absorbed by mainstream culture. For example, masturbation and birth control techniques are discussed on the popular network television sitcom "Seinfeld"; Dr. Ruth Westheimer has been a national celebrity for over a decade for her frank, informative discussions of sexuality on radio and television; unflinching larger-than-life close-up nude photographic self-portraits by John Coplans are accorded a special exhibition at the Museum of Modern Art in New York; a musical play featuring an all-nude cast—"Oh! Calcutta"—runs for years off-Broadway; and the publication of information concerning safe sex techniques to adults and minors alike has literally become a matter of life and death. Given the breadth and candor with which sexual subject matter has been treated by the mainstream media, who can reasonably judge what material constitutes non-obscene descriptions or depictions of "sexual or excretory activities or organs" that are "patently offensive"?

Curiously, the Act itself acknowledges the unworkable vagueness of the definition of indecency in its unusual provision allowing cable operators to ban programming they "reasonably believe[ ]" to be indecent. Since there is no way to determine with anything approaching objective certainty what *is* "patently offensive as measured by contemporary community standards," the statute explicitly incorporates the cable operator's subjective judgment as to what meets the definition. This language not only constitutes an admission of the lack of a discernible standard, it also creates further subjectivity and vagueness. *See Gay Men's Health Crisis* v. *Sullivan*, 792 F. Supp. 278, 295-96 (S.D.N.Y. 1992) (holding uncon-

stitutionally vague grant guideline for AIDS educational materials requiring that materials not be "offensive to a majority of the intended audience"; such a standard requires two levels of subjective analysis: a subjective judgment as to what a majority of other adults will think offensive).[4]

In addition to the actual language of the Act, this Court's precedents compel the conclusion that the Act's definition of "indecent" programming is unconstitutionally vague.[5] The Court has frequently struck down on vagueness grounds regulations of speech which similarly employ subjective standards because the language failed to provide sufficient

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[4] *See also Big Mama Rag, Inc.* v. *United States*, 631 F.2d 1030, 1037 (D.C. Cir. 1980) (holding unconstitutionally vague an IRS regulation requiring officials to apply "an individualistic—and therefore necessarily varying and unascertainable—standard: the reactions of members of the public" to organizations' literature).

[5] Although the Court narrowly upheld an FCC ban on "indecent" language as applied in a particular factual context in *Pacifica*, AAP submits that *Pacifica* is not controlling, or even persuasive, here. First, the Court in *Pacifica* was not considering a facial vagueness challenge; rather, the limited issue before the Court was whether the repeated use of seven specific "filthy" words in an afternoon radio broadcast was indecent within the meaning of FCC regulations. *See Pacifica*, 438 U.S. at 742. Second, that decision, which turned upon the accessibility of radio broadcasts to children, *see Pacifica*, 438 U.S. at 746, has no bearing on cases involving cable television or other non-broadcast media. *See Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 125 (1989) (referring to *Pacifica* as an "emphatically narrow holding" that did not involve a total ban on indecent material and that emphasized the "unique" attributes of broadcasting); *Cruz* v. *Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) (striking down city ordinance regulating distribution of "indecent material" through cable television and distinguishing *Pacifica* as focusing on broadcasting's "pervasive presence" and unique accessibility to children). Furthermore, the Court made clear that regulation of the seven "filthy" words would not be permissible on the ground that they were "offensive" and that, in the Court's view, their use was unrelated to the expression of ideas. By contrast, the indecency provisions under consideration here expressly incorporate what is essentially an "offensiveness" criterion and would prevent the effective communication of many ideas.

guidance either to those who would seek to comply or to those charged with enforcement. The unifying theme in these decisions is that speech can never be regulated in accordance with value judgments or subjective standards of taste or morality, regardless of the force of the government interest at stake—even where that interest purports to be the protection of children from exposure to harmful material.[6]

Thus, in *Interstate Circuit*, 390 U.S. at 689, the Court stated:

> Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.

The Court went on to quote the following portion of Chief Judge Fuld's concurring opinion in *People* v. *Kahan*, 15 N.Y.2d 311, 313 (1965):

> It is . . . essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.

Interstate Circuit, 390 U.S. at 689.

Several cases demonstrate this Court's demand for precision in speech regulations and its insistence that speech not be regulated in accordance with standards of taste or morality. In *Interstate Circuit*, for example, the Court upheld a vagueness

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[6] *See Button*, 371 U.S. at 466 ("Laws that have failed to meet this [vagueness] standard are, almost without exception, those which turn on language calling for the exercise of subjective judgment, unaided by objective norms.") (Harlan, J., dissenting).

challenge to a city film licensing ordinance requiring a special license to show films deemed "not suitable for young persons" by a Motion Picture Classification Board despite the fact that the ordinance went to great lengths to define the term. The ordinance defined "not suitable for young persons" as *inter alia*:

> Describing or portraying nudity *beyond the customary limits of candor in the community*, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

Interstate Circuit, 390 U.S. at 681 (emphasis added). The statute further defined a film "likely to incite or encourage" delinquency or sexual promiscuity on the part of young persons as one which will:

> create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted

and further defined a film as appealing to "prurient interest" if

> its calculated or dominant effect on young persons is substantially to arouse sexual desire.

Id. at 681-82. In holding the statute unconstitutionally vague, the Court noted that:

> "[w]hat may be to one viewer the glorification of an idea as being 'desirable, acceptable or proper' may to the notions of another be entirely devoid of such a teaching. The only limits on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable or proper.' This is nothing less than a roving commission . . . ."

Id. at 688 (*quoting Kingsley Int'l Pictures Corp.* v. *Regents of University of N.Y.*, 360 U.S. 684, 701 (1959) (Clark, J., con-

curring in result)). The very same dangers are presented by the "patently offensive" standard. What may be to one viewer a patently offensive depiction of sex may be to another an entirely "desirable, acceptable and proper" portrayal.[7]

In *Smith* v. *Goguen*, 415 U.S. 566, the Court likewise struck down as unconstitutionally vague a Massachusetts statute imposing civil or criminal sanctions for, *inter alia*, "treat[ing] contemptuously the flag of the United States." Noting that "[w]hat is contemptuous to one man may be a work of art to another," the Court held the statute void for vagueness for subjecting a defendant to criminal liability "under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." *Smith*, 415 U.S. at 578. *See also Cohen*, 403 U.S. at 25 ("one man's vulgarity is another's lyric").

The Act also does not differ in kind from the plainly unconstitutional statute at issue in *Coates* v. *Cincinnati*, 402 U.S. 611 (1971), which made it a criminal offense for persons assembled on sidewalks to conduct themselves in a manner "annoying" to persons passing by. "Offensiveness" is only a more extreme degree of disapproval than "annoyance"; both lack objective grounding. Thus, the Court's observation that "the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no

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[7] The *Interstate* Court also observed that rather than run the risk of misinterpreting the statute, a film exhibitor "might choose nothing but the innocuous" or "only the totally inane," 390 U.S. at 684—a concern which applies here as well. The Court further noted the following film licensing standards previously held by the Court to be unconstitutionally vague: "sacrilegious" (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952)); "immoral" and "tend to corrupt morals" (*Commercial Pictures Corp.* v. *Regents*, 346 U.S. 587 (1954)); and "such films as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals" (*Holmby Productions, Inc.* v. *Vaughn*, 350 U.S. 870 (1955)). *Id.* at 682-83.

standard of conduct is specified at all," *Coates*, 402 U.S. at 614, applies equally to this case.[8]

The vagueness of section 10's definition of "indecent" is further highlighted by comparing it to this Court's much struggled-over definition of obscene material. The definition of obscenity in *Miller*, 413 U.S. at 24, although necessarily subjective to some extent, is, in three respects, more precise than the Act's definition of "indecent": first, it requires appeal to the prurient interest; second, it requires that the sexual conduct depicted or described be "specifically defined" by the applicable state law; and third, it requires that the material lack serious literary, artistic, political, or scientific value. This last prong, in particular, provides significant protection and confines obscenity to somewhat discernible boundaries.Thus, an ironic and lamentable aspect of the Act's indecency standard is that it subjects programming which, unlike obscenity, *is* protected by the First Amendment, *Sable*, 492 U.S. at 125, to suppression on the basis of a far *less* clearly defined standard than that which the Court has developed for obscenity.

"[I]n the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller*, 413 U.S. at 22-23. AAP submits that the inevitable censorship and self-censorship imposed by the Act's vague indecency standard on cable programmers and operators and, by inevitable extrapolation, on disseminators of information through the Internet and other electronic media, will stifle the transmission of a wide range of information of undeniable literary, artistic, political, and scientific value—a result utterly at odds with the First Amendment.

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[8] Moreover, as this Court repeatedly has made clear, the government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). *See also Hustler Magazine* v. *Falwell*, 485 U.S. 46, 55-56 (1988); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983); *Pacifica*, 438 U.S. at 745; *Cohen*, 403 U.S. at 25.

In a world where modes of communication are expanding exponentially and distinctions between traditional forms of media already have begun to blur, the speech concerns raised by this case are not confined to program fare on cable access channels. Tomorrow's adults will be receiving much of their literature, poetry and scientific information through electronic means—including via coaxial cable, through their televisions, into the home. This changing reality presents great potential for promoting our First Amendment ideal of placing ever more diverse expression and points of view into a marketplace of ideas to which Americans have ready access. The new electronic marketplace cannot begin to reach its promise, however, if the expression to take place in it is to be sifted through an "indecency" filter.

II. THE "LEAST RESTRICTIVE MEANS" TEST, IF TRANSMUTED INTO A "MOST EFFECTIVE MEANS" TEST, WILL RESULT IN UNCONSTITUTIONAL SUPPRESSION OF PROTECTED SPEECH

The Act also must be struck down as an impermissible content-based regulation of sp ech. A fundamental principle of this Court's First Amendment jurisprudence is that content-based regulations of speech are highly disfavored and are subject to "the most exacting scrutiny." *Texas* v. *Johnson*, 491 U.S. 397, 412 (1989); *see also Simon & Schuster*, 502 U.S. at 115-16. *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2459 (1994). Indeed, content-based regulations are presumptively invalid. *R.A.V.* v. *St. Paul*, 505 U.S. 377, 381 (1992).

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence . . . . Government action that stifles speech on account of its message . . . contravenes this essential right.

Turner, 114 S. Ct. at 2458. *See also Cohen*, 403 U.S. at 24. Therefore, "subject only to narrow and well-understood exceptions," the First Amendment "does not countenance govern-

mental control over the content of messages expressed by private individuals." *Turner*, 114 S. Ct. at 2458.

This case is compelling evidence of the threat of overreaching, imprecision, and the consequent unjustifiable suffocation of First Amendment rights when the government presumes to regulate speech on the basis of content. For this reason, AAP concurs with the view recently expressed by Justice Kennedy that a strict scrutiny analysis, which permits government regulation upon a showing that the statute serves a compelling state interest and is narrowly tailored to advance that interest, "has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only." *Simon & Schuster*, 502 U.S. at 124 (Kennedy, J., concurring).

Should the Court nevertheless continue to apply the strict scrutiny analysis outlined in *Sable*, 492 U.S. at 125, it should do so with vigilant concern for the First Amendment interests at stake. As an initial matter, the Court must require the government to demonstrate that its ends are compelling. Judge Wald's dissenting opinion below cogently exposes the shortcomings in the government's showing in this regard. *Alliance for Community Media*, 56 F.3d at 136-140 (Wald, J., dissenting).

In this case, the chief proponent in the Senate of the floor amendments that are codified as section 10 described their purpose as "putt[ing] an end to the kind of things going on" on access channels—a plainly unconstitutional purpose. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992). Moreover, section 10 was never considered in committee and was never the subject of congressional hearings or findings. Furthermore, Congress never justified its assumption that all programming that is "patently offensive" is actually *harmful* to children; this overbreadth in regulating casts further doubt upon the validity of the regulatory scheme. The willingness of the

majority below to approve such sweeping restrictions on speech on the basis of such a paltry demonstration of a compelling state interest represents an abdication of the judiciary's duty to guard against unwarranted government intrusions upon constitutionally protected rights.

In addition, in order to ensure that non-obscene speech relating to sex can be readily expressed, the "least restrictive alternative" prong of the strict scrutiny test must not be transformed into a "most effective alternative" test. Otherwise, it will be too easy for the government simply to impose the most draconian and burdensome restrictions on any number of the emerging and existing forms of communication, call them the most effective, and then argue that no other means are as effective in achieving the government's purpose. That transparently circular reasoning is precisely what the majority below approved in this case. *See Alliance for Community Media*, 56 F.3d at 125 (concluding that segregation and mandatory blocking "*most effectively* further the compelling interest in protecting children from indecent leased access programming") (emphasis added).[9] Such reasoning is forbidden by this Court's numerous precedents in which strict scrutiny has been employed, *see, e.g., St. Paul*, 505 U.S. 377; *Simon & Schuster*, 502 U.S. 105; *Johnson*, 491 U.S. 397; *Sable*, 492 U.S. 115, and would have a devastating impact on speech.

Finally, the majority below appears to have forgotten that the burden is on the government to show that its content-based regulation is the least restrictive means. *See, e.g., Sable*, 492 U.S. at 125. Thus, in *Sable*, the Court rejected a blanket ban on indecent interstate commercial telephone messages on the ground that "the congressional record contains

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[9] *Cf. Simon & Schuster*, 502 U.S. at 120 (noting with approval the observation of Judge Newman in his dissent below that by means of positing the *effect* of a statute as the government's interest " '[e]very content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech' ").

no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors." *Id.* at 129.[10]

In this case, the majority below concluded that lockboxes and restrictions on the hours of programming were ineffectual means of advancing the government's interest based on nothing but a sheer assumption that viewers opting to use lockboxes would "inevitably" slip up or lapse and inadvertently expose children to indecent leased access programming (on isolated occasions) and that even if "indecent" programming were shifted to late night hours, some unsupervised children would have access to it. *Alliance for Community Media*, 56 F.3d at 124. As Judge Wald noted in dissent, however, nothing in the record supports the assumption that cable lockboxes are not an effective means of protecting children from indecent programming. To the contrary, both Congress and the FCC have found them effective. *Id.* at 140 (Wald, J., dissenting).

The majority's hypothetical and, in terms of impairment of the government's objective, wholly unquantified concerns regarding the alternatives cannot serve as a justification for the onerous burdens on speech imposed by section 10. Adequate solicitude for the First Amendment rights of transmitters and receivers of constitutionally protected "indecent" material demands more rigorous scrutiny of speech-restrictive regulations.

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[10] Even in relation to commercial speech regulations, to which the Court accords a lower level of scrutiny, the government bears the burden of demonstrating that the challenged regulation "advances the Government's interest 'in a direct and material way.' " *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995) (citation omitted) (striking down regulation barring inclusion of alcohol content on beer labels on ground that regulation did not "directly and materially advance" government interest in avoiding strength wars).

As earlier noted, technological solutions to concerns over minors' access to potentially unsuitable materials available in the electronic marketplace are in the offing. Such private sector solutions are constitutionally far more preferable than heavy-handed government regulation which impinges on adult access to constitutionally protected materials.

CONCLUSION

For the foregoing reasons, AAP urges the Court to hold section 10 of the Cable Television Consumer Protection and Competition Act of 1992 and its implementing regulations unconstitutional and reverse the judgment below.

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